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Administrative Law:
Historical Origins of America's Administrative Exceptionalism

Reuel Schiller¹

Students of comparative administrative law have long noted two things about the American administrative state that differentiates it from those of other advanced industrial democracies: the American administrative state is underdeveloped, and independent courts and legalistic behavior by regulators have an outsized influence on American regulatory policy.

This article argues that these two phenomena are products of the American historical experience. In particular, the dimensions of the contemporary regulatory state result from a combination of ideological, political, and institutional factors. Ideologically, American political culture contains contradictory attitudes towards the state. Throughout American history Americans embraced a strong, "positive" state. At the same time, a powerful current of laissez-faire hostility towards the state permeates American political culture. This unstable ideological bedrock is the foundation upon which the modern American regulatory state is built.

The political factors that shaped the rise of the administrative state in the United States were similar to those felt in all industrializing countries. The growth and dislocation caused by rapid industrialization led to political demands for the increased regulation and control of the emergent capitalist order. In the United States, however, these political impulses were filtered through and dampened by a national government with a particular set of institutional structures. Thus, the demands for regulation and other forms of state intervention were weakened by both the ideological ambivalence of American political culture towards the state, and obstructive institutional mechanisms. Ultimately, this ideological ambivalence and institutional resistance combined in the form of judicial control of the administrative process.

1. Summarized and excerpted from Reuel Schiller, *The Historical Origins of American Regulatory Exceptionalism*, in *COMPARATIVE LAW AND REGULATION* (Francesca Bignami & David Zaring eds. 2016).

The Stunted Development of the American Administrative State

The growth of the American administrative state has been constant. Every decade of American history has seen political crises that have generated impulses towards regulation. In antebellum America, courts shaped common-law doctrines to promote economic growth, while states, localities, and, to a lesser extent, the federal government developed administrative mechanisms to protect the public welfare from the negative effects of such growth. The years between the Civil War and the Great Depression saw a dramatic growth of administrative institutions at both the state and federal level, as the American state responded to the dislocating effects of rapid industrialization and corporate consolidation. The Great Depression generated another round of regulatory innovation, resulting in many of the administrative entities that form of the core of our modern administrative and welfare state. Similarly, political and social reform movements of postwar America yielded regulatory mechanisms for furthering reform goals, be they the promoting of equal employment opportunity or a cleaner environment. More recently, economic crises have once again generated regulatory impulses, creating new regulations for banking and securities markets.

While this growth of the administrative state has been dramatic, the peculiar institutional structure of the United States has inhibited it. In the late nineteenth and early twentieth century, judicial resistance under the guise of substantive due process was one limitation. Institutional obstacles imposed other, more persistent, limits. The American state is structured in such a way as to impede the development of national administrative institutions. Federalism, the requirements of bicameralism, and the customs and rules of the Senate fostered a form of political localism that made creating national regulatory regimes difficult.

This fact was compounded by the extraordinary power of locally-oriented political parties. Few politicians had much interest in creating national institutions that might undermine their power. Thus, rather than developing a tradition of bureaucratic governance, as was the case in Europe, the American administrative state developed as a piecemeal response to particular political pressures, processed through governmental institutions that themselves limited the effectiveness of regulatory policies.

This was particularly obvious during the New Deal. Lack of existing institutional capacity frequently required the administration to regulate through existing, often private, structures. Sometimes, as with the Security and Exchange Commission's regulation of stock exchanges, doing so was successful. Other times, as with the National Recovery Administration's dependence on industry boards, it was a disaster.

Additionally, federalism, bicameralism and the disproportionate power of southern politicians due to one-party rule in the South lead to the devolution of public assistance programs and many regulatory regimes to state and local actors. This limited the effectiveness of many administrative programs. Southern politicians were not going to allow the Fair Labor Standards Act, the National Labor Relations Act, or the Social Security Act to upset the racial hierarchy in their state by lessening African American economic dependence on local whites. Similarly, state and local implementation of social-welfare programs was shaped both by that same impulse and by a genuine lack of state capacity. The only way to quickly implement a public-assistance program in a country with a comparatively small federal bureaucracy was to enlist state and local officials into the process, even if doing so meant that some policies would be carried out in a manner that was less than fully effective.

Indeed, even modern regulatory innovations bear the characteristics of the underdeveloped American state. They still have a patchwork feel, as if they are haphazard intruders into a "natural" world of private ordering. Many are still highly contested in the political arena, and are thus frequently hampered by aggressive political oversight. For some, the involvement of states required by federalism has created inefficiencies. Most significantly, all of them are weakened by the United States' commitment to an outsized judicial role in the regulatory processes. This manifests itself in two ways. The first is the intensity with which courts oversee the administrative process. The second is the fact that both Congress and the courts have forced regulatory actors to act in a proceduralized, judicial manner. Agencies must behave like little courts, complete with procedures that inhibit efficiency in order to protect the rights of individuals from the power of the state. This is the final stop in historicizing the exceptionalism of the American regulatory state. Why are courts and court-like behavior so central to American regulation?

Courts and the Administrative State

The modern conception of judicial review dates from the beginning of the twentieth century. It was then that courts divided any given administrative action into findings of fact, interpretations of law, and the application of law to facts. “Pure” issues of law were to be decided by courts, while factual findings and the application of law were done by the agency, subject to some form of intermediate scrutiny by the judiciary. Courts would review whether administrative action was an “abuse of discretion”; whether it was “reasonable”; and whether it was supported by “substantial evidence.” Each of these standards sought to subject administrative action to a form of judicial monitoring that sat somewhere between absolute passivity and *de novo* review.

Nor was the emergence of the appellate model of judicial review the only manifestation of judicial meddling with the regulatory process. The twentieth century also saw the increasing judicialization of regulatory entities themselves. Regardless of how intense judicial review of administrative action was, the agencies themselves were to behave in a judicial fashion. Their decisions should be made in an adversarial proceeding, with evidentiary records, independent adjudicators, and a chance for the parties to appear and confront the agency officials who would regulate them. This tendency is most obvious in the passage of the federal and state administrative procedure acts, all of which imposed these sorts of court-like requirements on agency adjudications. The due-process cases of the 1960s similarly judicialized many informal agency actions. In the 1970s, federal courts transformed even that least judicial of regulatory actions—issuing regulations—into an adversarial process by imposing a series of quasi-adjudicatory requirements on agency rulemakers: detailed notice, decisions based on a record, agency disclosure of data, and agency responses to cogent comments by the regulated. Thus, over the course of the twentieth century, courts developed a distinctive role in the American regulatory process. Indeed, even outside of the confines of judicial review, twentieth-century administrative law expected agencies to behave like courts.

Timing and legitimacy help explain the rise of judicial review and the judicialization of the administrative process. Courts asserted their control over the administrative process at the beginning of the twentieth century, just as the administrative state was becoming

national in scale and broader in the subjects it regulated. Thus, the rise of judicial control of the administrative process related to issues of legitimacy. To the extent that the vast majority of administrative entities in the nineteenth century were local and state bodies regulating in areas that were traditionally thought of as subject to government regulation, the administrative state's legitimacy went unquestioned. Indeed, such regulation was legitimated by its connection to local, community norms. Regulation was thus legitimated by tradition. It was woven into the fabric of local communities.

With the growth of national administrative structures and with the expansion of the palate of regulatory subject matters, this basis for legitimacy disappeared, and people went looking for others. They found these new sources of legitimacy in the courts. Since colonial times, American political culture assigned to common-law courts and the lawyers who practiced before them a special role in the protection of individual rights against the state. The legal profession's job was to act as a buffer between the state and society, defending liberty and the rule of law. To assist lawyers in this task were some traditional mechanisms—juries and the common law—and distinctly American institutional innovations, especially judicial independence, judicial review, and separation of powers. Thus, with the rise of national bureaucratic structures in the late nineteenth century, it is not surprising that lawyers and courts would be enlisted in the defense of traditional liberties against the new leviathan. What better way to protect individuals from the arbitrary power of the regulatory state than to ensure that courts and lawyers sat atop that state, and to demand that agencies behave as much like courts as possible?

Conclusion

Judicial review is thus the final element in the story of the historical origins of American regulatory exceptionalism. Its basis in the idea that courts and lawyers have a special role in protecting individual liberty connects it with the *laissez-faire* ideology that is prevalent in American political culture. Its rise also identifies it as yet another institutional characteristic of American government that has the effect of limiting the strong regulatory impulses that have frequently emerged from American society. A political victory establishing a new regulatory regime could easily be undermined by

judicial oversight or the proceduralization of the administrative process.

The story of the weak American administrative state and the prevalence of judicial control of the administrative processes are thus linked. They also sit within the same ideological medium: an American political culture where a commitment to laissez-faire principles is in constant struggle with both republican communal values and the felt political necessities of responding to the dislocations caused by a modern, capitalist economy. The policy impulses that flow out of this complex, contradictory political culture are themselves warped and dampened by American institutional arrangements. Intense judicial review, the proceduralization of the administrative process, the divisions of government power, and the persistent localism of the dominant political parties combine to make regulatory action, particularly at the national level, difficult.